IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION II

STATE OF WASHINGTON, Respondent, v. CORRINA A. LYNCH, Appellant.	No. 37277-1-II UNPUBLISHED OPINION

Penoyar, J. — The State charged Corrina Lynch with one count of vehicular assault. The original information alleged that Lynch caused bodily harm to an individual instead of substantial bodily harm as the statute requires. After the State rested, the trial court allowed the State to reopen its case to amend the information to correct the defect. A jury found Lynch guilty of one count of vehicular assault. Lynch raises two significant issues on appeal: (1) that the trial court abused its discretion when it permitted the State to amend the information after the State had rested and (2) that defense counsel's failure to move for dismissal after the State moved to amend constituted ineffective assistance of counsel. Additionally, Lynch argues that the mandatory joinder rule barred the State from amending the information to correctly charge vehicular assault when the original information contained sufficient facts to support a charge of driving under the influence (DUI). We reverse and remand, finding that the late amendment was improper.

FACTS

On May 25, 2007, Hoquiam Police were called to respond to a vehicle-pedestrian collision in an apartment building parking lot. When he arrived, Officer Mitchell observed Ines Ontiveros pinned between a parked truck and a black Monte Carlo. Mitchell contacted the Monte Carlo's driver, Lynch. Mitchell noted that Lynch had blood shot and watery eyes, slurred speech, and a strong odor of intoxicants on her breath. Lynch told Mitchell that she had struck Ontiveros but did not know how. When asked if she had been drinking, Lynch said she had two beers and one rum and coke before driving home. Lynch attempted to perform field sobriety tests, but she could not complete the tests without falling. After being transported to the Hoquiam police station, Lynch submitted to a blood draw, which revealed she had a blood alcohol content of 0.31 grams per 100 milliliters.

An ambulance transported Ontiveros to Grays Harbor Hospital with multiple compound fractures to his leg. After they stabilized him, he was transported to Harborview Medical Center, where he underwent multiple surgeries over 17 days.

The State charged Lynch by information with one count of vehicular assault, alleging that she "operate[d] [a motor] vehicle while under the influence of or affected by intoxicating liquor and did cause bodily harm . . . contrary to RCW 46.61.522 . . . ." Clerks Papers (CP) at 1. Under the statute, vehicular assault requires that the defendant cause substantial bodily harm. RCW 46.61.522(1).

Neither the State nor the defense noted the insufficient charging document until the second day of trial. After the State had rested, the defense noted that the "to-convict" instruction

alleged substantial bodily harm, an element that was not included in the information. 2 RP at 187. The defense moved to strike the instruction and send the case to the jury with only an instruction as to the lesser included DUI offense.

The State objected, noting that defense counsel had reviewed the jury instructions previously and raised no objection until the State had rested its case. The State requested the trial court's permission to reopen its case-in-chief in order to allow it to amend the information.

After extensive argument, the trial court informed the parties that it would either entertain a motion to dismiss without prejudice from the defense or grant the State's motion to reopen its case and amend the information. After requesting a brief recess, discussing the case options with Lynch, and extensively questioning the trial court on the record, defense counsel reiterated his objection to the State reopening its case but refused to move for dismissal without prejudice. Defense counsel again attempted to characterize the information as charging DUI, a lesser included offense to vehicular assault and speculated that dismissal without prejudice was not the only remedy because the information, while insufficient to allege vehicular assault, would be sufficient to allege DUI.[1]

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[1] Defense counsel attempted to distinguish similar cases where the trial court dismissed the case without prejudice by noting in those cases:

> Right now the information is alleging a DUI and it has some extra words on there, bodily injury.
>
> With regard to our only remedy being dismissal . . . I would be willing to guess that this case is distinguishable from [those] cases because I bet that [those] cases are cases where the information [was] found to be defective and not alleging a charge at all, which isn't the case here because DUI has been alleged.

2 RP at 193.

Because defense counsel refused to move for dismissal without prejudice, the trial court allowed the State to amend the information.[2] After the State amended the information to include substantial bodily harm, the jury found Lynch guilty of vehicular assault. She now appeals.

ANALYSIS

I. Amendment of the Information

Both the state and the federal constitutions require the State to inform an accused person of the nature and cause of the charges against them. U.S. Const. amend. VI, Wash. Const. art. 1, § 22. A charging document adequately informs the defendant if it lists (1) the elements of the crime charged and (2) a description of the specific conduct that constituted the crime. *Auburn v. Brooke*, 119 Wn.2d 623, 629-30, 836 P.2d 212 (1992). Courts refer to these requirements as the essential elements rule. If the State fails to meet the requirements of the essential elements rule in the original information, it may move to amend the information. *State v. Schaffer*, 120 Wn.2d 616, 621, 845 P.2d 281 (1993). The court may permit the State to amend the information at any time if substantial rights of the defendant are not prejudiced. CrR 2.1(d). Once the State has rested, however, Washington courts have held that any amendment other than an amendment to a lesser charge is a per se violation of the defendant's constitutional rights. *State v. Vangerpen*, 125

Later, when clarifying what case the trial court was offering to dismiss, defense counsel again characterized the information as alleging DUI, referring to the case before the court as, "[T]he State of Washington vs. Corrina Lynch the DUI charge?" 2 RP at 197.

[2] When invited to make a motion to dismiss, defense counsel stated:

> We're not going to make any additional motions at this time. We feel [it's] improper for the State to be allowed to amend the information . . . so we're not going [to] move for . . . dismissal at this time.

2 RP at 199-200.

Wn.2d 782, 791, 888 P.2d 1177 (1995). We review a trial court's decision to allow the State to amend a charge for abuse of discretion. *State v. Haner*, 95 Wn.2d 858, 864, 631 P.2d 381 (1981).

Lynch argues that the trial court abused its discretion when it allowed the State to amend the vehicular assault charge after the State presented its case-in-chief because under *Pelkey* and *Vangerpen*, any amendment to the charging document after the close of the State's case in chief is a per se violation of the defendant's constitutional right to know the nature and cause of the charge against her. Appellant's Br. at 15; *Vangerpen*, 125 Wn.2d 789; *State v. Pelkey*, 109 Wn.2d 484, 491, 745 P.2d 854 (1987). In response, the State claims that Lynch waived her ability to appeal on this issue by failing to move for a dismissal without prejudice from the trial court. However, the State cites no authority that waiver, a knowing relinquishment of a known right, occurs where a defendant refuses to agree to either of the two options the court offered.

The State appears to argue that because defense counsel refused to move for a dismissal without prejudice, defense counsel waived any objection to the insufficient information. The State's sole citation to authority in support of its claim is to a footnote in *State v. Quismundo*, 164 Wn.2d 499, 505, n.4, 192 P.3d 342 (2008).[3] Strangely, the referenced footnote explicitly states

[3] The footnote reads:

> This case does not ask us to consider a situation in which a defendant validly waives his rights under *Pelkey* and *Vangerpen*. Quismundo clearly noted his objection to the trial court's denial of his motion to dismiss. . . . That he erroneously asked for dismissal with prejudice rather [than] without prejudice does not amount to a waiver. We will find waiver only where a defendant voluntarily relinquishes a known right. *City of Seattle v. Klein,* 161 Wn.2d 554, 556, 166 P.3d 1149 (2007) (noting that "[t]he only means by which . . . an individual constitutional right in Washington may be relinquished is by a voluntary, knowing,

that failure on the part of defense counsel to request an appropriate remedy does not constitute waiver. *Quismundo*, 164 Wn.2d at 505 n 4. Waiver occurs only where a defendant voluntarily relinquishes a known right. *City of Seattle v. Klein*, 161 Wn.2d 554, 556, 166 P.3d 1149 (2007). The State fails to cite any language in the record supporting such a relinquishment. In fact, when declining to move for a dismissal without prejudice, defense counsel specifically stated that he was not waiving any rights.

The State fails to provide us with case law on point and, in fact, the case law it does cite leads to the opposite conclusion. The State fails to meet the high burden of proving that the defendant waived her rights. We reverse and remand, because the late amendment was improper. We see no reason to order any relief other than dismissal without prejudice. We need not address the other issues Lynch raises.

A majority of the panel having determined that this opinion will not be printed in the Washington Appellate Reports, but will be filed for public record pursuant to RCW 2.06.040, it is so ordered.

Penoyar, J.

We concur:

Van Deren, C.J.

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and intelligent waiver").

Quismundo, 164 Wn.2d at 505 n.4.

Bridgewater, J.